No. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, *Appellant*,

v.

E. I. DU PONT DE NEMOURS & COMPANY, ET AL.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees move that the judgment of the District Court be affirmed on the ground that the questions raised by appellant are so insubstantial as not to warrant further argument.

STATEMENT

This is an appeal by the United States from one portion of the judgment of the District Court of the United States for the Northern District of Illinois, brought pursuant to Section 2 of the Expediting Act of February 11, 1903 (32 Stat. 823; U.S.C., Tit. 15, Sec. 29) as amended by Section 17 of the Act of June 25, 1948 (62 Stat. 869). The judgment of the District Court, entered December 9, 1954, dismissed a com-

plaint filed against appellees, and many others,[1] alleging a combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act (Act of July 2, 1890, 26 Stat. 209; U.S.C., Tit. 15, Secs. 1 and 2) and a violation of Section 7 of the Clayton Act (Act of October 15, 1914, 38 Stat. 730; U.S.C., Tit. 15, Sec. 18).

The Jurisdictional Statement does not adequately expose the true nature of this appeal. By framing its contentions in terms of alleged "erroneous standards" applied to the evidence on the commercial relationships between du Pont and General Motors, the Government would create the impression that the Court can avoid a review of the evidence and the findings, and confine its consideration to matters of law. Yet upon analysis, as we point out in the Argument below, the Government's contentions on the alleged "erroneous standards" are seen to be no more than attacks

[1] The complaint charged a vast conspiracy, the essential terms of which were that three individual defendants (Pierre, Irenee and Lammot du Pont) had caused three defendant manufacturing corporations (du Pont, General Motors and U. S. Rubber) to become parties to an agreement which created for each of them protected markets represented by such requirements as the other two might have for products which each produced or might produce, and that restrained each from encroaching upon the industrial domain of the others. The original non-manufacturing defendant corporations (Christiana Securities Company and Delaware Realty & Investment Company), and a large number of du Pont "family" defendants, together with the Wilmington Trust Company (later added by amendment to the complaint) were alleged to be links in the chain by which the three individual defendants had dominated the three manufacturing defendant corporations and secured their adherence to this restrictive plan. The three individual defendants have been dropped; U. S. Rubber itself has been dropped; and the du Pont "family" defendants have been dropped, along with the Wilmington Trust Company. Christiana and Delaware remain as appellees only in connection with the Government's prayer for relief in the event the decision below should be reversed.

on the correctness of findings. Inescapably the Government is asking this Court to undertake what virtually amounts to a trial *de novo* on a record consisting of thousands of exhibits and many thousands of pages of testimony, and involving numerous issues as to the intent, motive and design underlying innumerable transactions which have taken place over a period of some thirty years. The District Court heard all of this evidence in a trial which lasted many months, and embodied its findings of fact and conclusions in an opinion of 220 printed pages. The opinion was a year in preparation, and gives abundant internal evidence of the care with which the District Judge studied the transcript of the trial and the voluminous briefs and proposed findings of fact which were submitted by the parties.[2]

The findings of the District Court cover 30 years of history and relate to a myriad of transactions. The findings rest on a mass of evidence which discloses in the most intimate, minute and complex detail the facts of the relationship between du Pont and General Motors. It is the facts that are decisive on the basic issue raised by the Government's contention. Stated simply that contention is that du Pont's stock ownership in General Motors and its representation on the Board of Directors of General Motors and on committees of that Board, have been for the purpose and have had the effect (1) of restraining trade in products manufactured by du Pont and used by General Motors, and

[2] The District Court heard 52 witnesses, and received 1087 Government and 1059 defendants' exhibits. The transcript numbers 8283 pages. The Government's Post-Trial Brief in the court below was 777 pages long; the post-trial briefs filed by the defendants totalled 842 pages. The Government's proposed findings of fact and conclusions of law covered 151 pages; those of the defendants 411 pages.

(2) of restraining General Motors' freedom to exploit its own chemical discoveries. Although the Government's Jurisdictional Statement emphasizes the issue of actual or theoretical control of General Motors by du Pont it is apparent on the face of the Government's arguments that the issue of control is not in itself the decisive question in the case.

In short, the issue has been and is—why has General Motors made certain purchases from du Pont, and why did it select du Pont as the manufacturer of certain chemical discoveries. It is the Government's contention that these decisions were coerced or controlled by du Pont or were the result of an unlawful understanding or agreement between the two companies. It follows that if in fact the decisions have been solely the result of the unhampered business judgment of General Motors on the one side and of du Pont's competence in the field of manufacturing on the other, the Government's cause of action fails. After considering all of the evidence, documentary and testimonial, the trial court concluded that the Government had failed to prove its contention and that the evidence sustained a finding that General Motors had at all times acted in the exercise of its own unfettered judgment (p. 219):

> "The essence of the conspiracy and restraint which the Government finally charged and sought to prove in this case is the alleged limitation upon General Motors' ability to deal as it pleased with competitors of du Pont and United States Rubber. In various ways and subject to various limitations, the Government has alleged that General Motors either itself agreed to such a limitation, or was forced to it by du Pont. But the evidence of record fails to support the Government's charges. In preceding portions of this opinion there has

been shown, by detailed analysis of the evidence, the extent to which General Motors enjoyed complete freedom of action with respect to specific products manufactured by du Pont and United States Rubber, and with respect to its discoveries and developments of new products. When read as a whole the record supports a finding, and the Court so finds, that there has not been, nor is there at present, a conspiracy to restrain or to monopolize trade and no limitation or restraint upon General Motors' freedom to deal freely and fully with competitors of du Pont and United States Rubber; no limitation or restraint upon the freedom of General Motors to deal with its chemical discoveries, no restraint or monopolization of the General Motors market, and no restraint or monopolization of the trade and commerce between du Pont and United States Rubber."

In reaching these ultimate conclusions the court reviewed the evidence on each product that had been or could have been purchased by General Motors from du Pont.

With respect to finishes, many of the court's extensive findings (pp. 115-134) dealt with "Duco", a pyroxylin lacquer invented and patented by du Pont (p. 132), which revolutionized the automobile industry's finishing practices. "Duco's" early testing and its early use by the automobile divisions of General Motors are dealt with, as well as the later adoption by several of the automobile divisions of competitive pyroxylin lacquers, when they became available. The court found (p. 133) that General Motors divisions have purchased finishes from whatever company best served their needs. For example, the opinion points out that while Chevrolet and Buick purchase from du Pont, Cadillac and Oldsmobile purchase their re-

quirements from du Pont's competitors; Pontiac purchases from du Pont and Fisher Body purchases topcoats from a number of suppliers, including du Pont, but purchases undercoats principally from a du Pont competitor (p. 124).[3]

The opinion likewise deals at length with the extent to which some of the non-automotive divisions of General Motors, notably Frigidaire, have purchased other du Pont finish products, particularly "Dulux", a synthetic enamel developed by du Pont and widely used by many manufacturers on refrigerators and similar home equipment (pp. 125-126). The court analyzes the statistics on finish sales introduced by both the Government and the defendants, and after finding (p. 132) that a very substantial portion of the finish sales by du Pont to General Motors consisted of "Duco" and "Dulux", concludes (pp. 133-134):

> "* * * In view of all the evidence of record, the only reasonable conclusion is that du Pont has continued to sell Duco in substantial quantities to General Motors only because General Motors believes such purchases best fit its needs.
>
> "The evidence with respect to Dulux presents a similar picture. It is apparently an ideal

[3] The Jurisdictional Statement erroneously cites two findings by the District Court relating to finishes as though they related to all du Pont products. The finding (p. 133) that du Pont has been "the most important single supplier of General Motors", which is cited without qualification by the Government (p. 15), was used by the District Court only in relation to finish suppliers. The finding (p. 130) that General Motors "has been du Pont's largest single customer", also cited by the Government without qualification (p. 15) was used by the District Court only in relation to customers of du Pont's Fabrics and Finishes Division, one of du Pont's ten operating divisions.

> refrigerator finish and is widely used by a number of major manufacturers other than General Motors. * * * There is no evidence that General Motors purchased from du Pont for any reason other than those that prompted its competitors to buy Dulux from du Pont—excellence of product, fair price and continuing quality of service."

General Motors' purchases of fabrics for the past four decades are dealt with in equal detail (pp. 134-145). The court made numerous findings as to the successes and failures of du Pont since 1917 in selling fabrics to the several divisions of General Motors, and concluded that General Motors divisions purchased from whom they wished. For example, the court found (pp. 138-139) that in recent years the Fisher Body Division of General Motors has purchased most of its top material for convertibles from a competitor of du Pont, that it has purchased its requirements of coated fabrics for interior trim from a number of suppliers, including du Pont, and that it has purchased only about 3 percent of its annual requirements of $1,000,000 worth of weather stripping cement from du Pont.[4] The court summed up its findings as to fabrics by stating (pp. 144-145):

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[4] The Jurisdictional Statement (p. 14) would leave the impression that General Motors has purchased 80 percent of its textile requirements from du Pont. In fact, the District Court made findings on the percentage of General Motors' fabric requirements supplied by du Pont in only two periods; it found that in 1930 du Pont supplied only some 31 percent (p. 138); and in 1946-1947, the two years immediately prior to the issuance of the complaint, between 40-50 percent (p. 144) of General Motors' fabric purchases. The wide variety of du Pont's successes and failures in selling its fabrics products to individual General Motors divisions over the years is detailed in the findings at pp. 134-140.

> "* * * The Court further finds that such purchases of fabrics as the General Motors divisions have made from du Pont from time to time were based upon each division's exercise of its business judgment and are not the result of du Pont domination. Du Pont, the record shows, has maintained its position as the principal fabric supplier to General Motors through its early leadership in the field and by concentrating upon satisfactorily meeting General Motors' changing requirements as to quality, service and delivery."

The findings with respect to antifreeze purchases from du Pont by General Motors relate principally to purchases of antifreeze for resale under a General Motors brand name. The court found (pp. 182-184) that General Motors initially sought to purchase its entire requirements of such antifreeze from a competitor of du Pont, and finally decided to purchase from du Pont only because the competitor refused to supply antifreeze to General Motors under a General Motors brand name, and because du Pont was the only other available supplier which could meet General Motors' demands as to price, quality and delivery. After further finding that General Motors had examined the supply situation each year, and that when competitive antifreeze became available in sufficient quantity all of the General Motors divisions except Oldsmobile ceased buying any antifreeze from du Pont, the court concluded (p. 184):

> "* * * The Court finds this proof convincing that General Motors was not limited by agreement or by du Pont domination in its purchases of antifreeze and bought from du Pont only because it believed that du Pont best served its needs."

The Jurisdictional Statement would suggest that commercial relationships between du Pont and Gen-

eral Motors were confined to these three products. In fact, the District Court made findings with respect to the numerous other products which General Motors used in substantial volume and which du Pont sought to sell to General Motors over the years, but as to which du Pont had been largely unsuccessful in its selling efforts. The District Court made careful and detailed findings with respect to General Motors purchases of electroplating chemicals (pp. 184-186), case hardening chemicals (pp. 186-190), rubber chemicals and synthetic rubber (pp. 190-192), automotive plastics (pp. 192-193), brake fluid (pp. 193-194), and safety glass (pp. 194-196). The court again concluded (p. 196):

> "All of the evidence bearing upon du Pont's efforts to sell these various miscellaneous products to General Motors supports a finding that the latter bought or refused to buy solely in accordance with the dictates of its own purchasing judgment. There is no evidence that General Motors was constrained to favor, or buy, a product solely because it was offered by du Pont. On the other hand, the record discloses numerous instances in which General Motors rejected du Pont's products in favor of those of one of its competitors. The variety of situations and circumstances in which such rejections occurred satisfies the Court that there was no limitation whatsoever upon General Motors' freedom to buy or to refuse to buy from du Pont as it pleased."

Finally, in the area of trade relations, the court examined at great length the charge that du Pont had obtained a preference in the development, production and sale of commercially valuable chemical products discovered by General Motors—tetraethyl lead (TEL), and "Freon" refrigerants. Neither branch of

the argument, as the court points out, has any present significance. The TEL patents expired in 1947, anyone may enter the field, and du Pont is now in vigorous competition with the Ethyl Corporation (owned 50 percent each by General Motors and Standard Oil of New Jersey) in both the production and marketing of TEL (p. 169). As to "Freon", the Government has voluntarily waived any demand for relief (p. 177).

The Government's Jurisdictional Statement correctly points out (pp. 15-16) that: "The TEL story is long and complicated"; the summary of it in the opinion of the court covers 25 pages (pp. 145-170), and many trial days of testimony and voluminous documentary proof on TEL are contained in the record. The end product was a conclusion by the court (p. 169) that the evidence "fails to establish the Government's charges". The court found (p. 170):

> "* * * It [the evidence] will not support a finding that the discovery of TEL was surrendered to du Pont pursuant to any agreement that du Pont was to have exclusive rights to General Motors chemical discoveries. The record, rather, establishes that the services of du Pont as a manufacturer were secured by General Motors in the unrestrained exercise of its own judgment. Kettering appears to have been largely responsible for this decision, and neither the alleged pre-existing agreement nor du Pont's stockholdings in General Motors was the basis of the decision. It is clear that General Motors' lack of experience in chemical manufacture and du Pont's superior competence and wide experience were the reasons for the decision.
>
> "Similarly, du Pont retained its position as the manufacturer of TEL by reason of the continued high quality of its performance. The

> Court finds that General Motors and Ethyl Corporation were at all times free to turn elsewhere and were not coerced in any way to continue purchasing from du Pont."

The court also carefully reviewed the testimonial and documentary proof relating to "Freon", a refrigerant which was produced and sold by Kinetic Chemicals, Inc. (pp. 170-177), and the proof relating to a synthetic rubber research program carried on by General Motors until 1928 (pp. 177-181) and made the following finding with respect to these two situations (p. 181):

> "The evidence relating to the formation and operation of Kinetic Chemicals and to General Motors synthetic rubber research does not establish that General Motors had agreed to surrender or was bound to surrender to du Pont its chemical discoveries."

And, as to the synthetic rubber evidence, the court added (*ibid.*):

> "* * * The evidence bearing on the entire incident is inconsistent with either a basic agreement with respect to General Motors chemical research or with du Pont domination of that research."

Although the District Court concluded that the ownership by du Pont of General Motors stock had not restrained in any way General Motors' purchasing freedom, or affected its decision on how best to exploit its chemical discoveries, nonetheless, it also examined the evidence on the so-called control issue in minute detail. The opinion recites (pp. 9-16) the circumstances under which du Pont originally acquired its approximately 23 percent interest in the stock of General Motors in 1917-1918, and concludes (p. 14) that

> "* * * the acquisition was essentially an investment. Its motivation was the profitable employment of a large part of the surplus which du Pont had available and uncommitted to expansion of its own business."

With specific reference to the alleged conspiracy now asserted to exist between du Pont and General Motors to restrain trade, the court also found (pp. 15-16):

> "* * * that du Pont did not invest in General Motors with the purpose of restricting that company's freedom to purchase in accordance with its own best interests. Du Pont, the record shows, never intended to preclude General Motors from dealing with suppliers of its choice, never made any effort to so preclude General Motors, and did not limit General Motors' purchasing freedom."

The court then proceeded to examine the several other aspects of the relationships which existed between du Pont and General Motors from 1918 to the date of the trial, which were relied on by the Government then, as they are now, as proof that du Pont controlled the purchasing policies of General Motors. The opinion notes (pp. 17-19) that in 1920, as a result of a crisis in General Motors' affairs resulting from the financial collapse of its founder and first president, W. C. Durant, it became necessary for du Pont to take over Durant's obligations and much of his stock holdings in General Motors, and for P. S. du Pont, who had retired from the presidency of du Pont, to become General Motors president and Chief Executive Officer. When, three years later, a suitable candidate for president was found within General Motors' ranks in the person of Alfred P. Sloan, Jr., Pierre du Pont resigned in his favor. (pp. 22-23). The opinion also analyzes in considerable detail the number of du Pont

nominees on the General Motors Board of Directors from 1918 on, finding that they never approached a majority of the Board (pp. 16, 23). The court found (p. 26) that "A majority of the directors have always been the nominees of management", selected without any consultation with du Pont nominees on the Board, and thereupon elected automatically. The opinion also reviews in detail the extent to which the du Pont nominees on the Board participated in the search begun by Sloan for a limited number of persons who might be elected to the Board as neither management nor du Pont nominees (pp. 24-25).

The organization and membership of the principal committees of the General Motors' Board of Directors is also carefully detailed in the opinion (pp. 26-34). The court found that originally, in accord with an understanding with Durant that du Pont assume primary responsibility for General Motors' financial affairs, the Finance Committee was composed almost entirely of du Pont nominees (p. 16), but that as competent people developed within the General Motors organization, the number of du Pont nominees on this committee declined. Du Pont nominees have not constituted a majority since 1924 and now are but three of a committee whose total membership in recent years has been nine or ten (pp. 29, 32). On the Executive Committee there was originally but one du Pont nominee (p. 16), and apart from the Durant crisis which compelled the du Pont nominees to assume temporary positions of executive responsibility for a few years in the early 1920's, du Pont nominees have never been active on the executive side or in operational affairs. No du Pont nominee, for example, has served on the Operations Policy Committee since its organization in 1946 (p. 32). The opinion also details the

reorganization of the committee structure of the General Motors Board in 1937 and 1946, and the extent of the limited participation of the du Pont nominees in the reorganization plans and on the committees which succeeded the earlier Finance and Executive Committees (pp. 29-33).

On the basis of this detailed analysis and review the District Court concluded (p. 33):

> "The participation of the du Pont representatives in the selection of General Motors directors and in determining the organization of the board and the composition of its committees does not establish that du Pont has been the controlling force in the direction of General Motors affairs, or has been in a position to act as if it owned a majority of General Motors stock. The record shows consultation and conference, but not domination. Moreover, in all these matters Sloan has clearly been the leader and the dominating influence and has largely determined the results. * * * Sloan's testimony and the record as a whole are convincing that at all times he acted independently and steadfastly in the best interests of General Motors."

And, with specific reference to the alleged conspiracy, the court added (p. 34):

> "* * * * Accordingly, the Court finds, based on all the evidence, that du Pont's participation in the selection of General Motors directors and management does not establish that it controlled General Motors or that it sought through such participation to place people in General Motors who would further du Pont's interests as a supplier or as a chemical manufacturer."

The opinion likewise explores at length the matter of General Motors' supplemental compensation or

bonus plans (pp. 34-40). After detailing the nature of the bonus plans, particularly the early Managers Securities Plan, and the extent to which du Pont nominees sponsored them and participated in their administration, the court concluded (p. 39):

> "The Court finds no evidence that any action taken by du Pont representatives with respect to the compensation of General Motors executives was intended to influence those executives to deal with du Pont or to refrain from dealing with du Pont competitors. Nor is there evidence of any instance in which a General Motors executive favored du Pont out of consideration for the latter's sale of stock to Managers Securities Company or out of deference to the position of du Pont representatives on the General Motors board."

The District Court likewise made findings on the extent and direction of the change in the relationship between du Pont and General Motors during the past quarter century. The opinion states (p. 40):

> "After the dramatic collapse of Durant and the ensuing financial crisis when du Pont representatives were thrust into positions of responsibility in General Motors, and after General Motors had been rescued from that crisis, du Pont's influence and position in General Motors declined radically. During the twenties, a force of considerable strength arose in General Motors that was important in determining any question of control. This force was the management headed by such a forceful and resolute character as Sloan and including such positive personalities as Kettering, the Fisher brothers, Knudsen, Pratt, Brown and Wilson.
>
> "More than a quarter of a century has passed since the twenties, and the strength and standing

of the management have continued to increase and improve. The du Pont representatives who had originally been interested in General Motors have died or retired. These developments are reflected in the contemporaneous documents, the changes in the membership of the board, and the various committees of the board, and in the testimony of Sloan and other witnesses.

"Irrespective of what its position may have been before and during the Durant crisis, since the 1920's du Pont has not had, and does not today have, practical or working control of General Motors. On the basis of all of the evidence the Court finds as a fact that du Pont did not and could not conduct itself, for the past 25 years, as though it were the owner of a majority of the General Motors stock."[5]

The District Court took account of the fact that du Pont's 23 percent of General Motors stock had on occasion constituted a majority of all the stock voted at stockholders' meetings. However, the court found reasonable and persuasive Sloan's testimony that the situation would have been radically different had there been a contest; and that in any contest it would be necessary to know what the issues were before one

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[5] The court reached a similar conclusion (p. 65) on the Government's charge that the du Pont family controlled U. S. Rubber. On that charge, too, the opinion covers in detail (pp. 42-65) the circumstances of the purchases by members of the du Pont family in 1927 of approximately 18 percent of U. S. Rubber's voting stock, the relationship of the purchasers to their nominees on the U. S. Rubber Board of Directors and its Finance and Executive Committees, the relationship of the purchasers to the officers of U. S. Rubber, and to the U. S. Rubber supplemental compensation or bonus plan. In this instance, however, the Government has not appealed the court's finding that control of U. S. Rubber by the du Pont family did not exist.

could estimate whether enough other stockholders would join with du Pont to permit its views to prevail. The court concluded (p. 42):

> "* * * It is entirely conjectural whether or not du Pont by its stock ownership could control if there had been a contest."

Finally, the court not only found a lack of intent upon the part of du Pont to control General Motors and a lack of actual control, but also found specifically a lack of any control over the purchasing policies and practices of General Motors (p. 89):

> "* * * The evidence, both oral and documentary, does not establish, however, that there was any agreement between the two companies that required General Motors to buy all or any part of its requirements from du Pont. Nor does the evidence establish that du Pont dictated or controlled the purchasing policies and practices of General Motors or sought to dictate or control those policies and practices. In fact, the evidence shows that General Motors exercised complete freedom in determining where it would purchase its requirements of products of the kind that du Pont manufactured."

ARGUMENT

The Jurisdictional Statement asserts (p. 13) that the court "applied an erroneous standard in evaluating" the evidence on du Pont trade relations with General Motors.[6] Notwithstanding the manner in

[6] The references in the Jurisdictional Statement (pp. 13-15) to what are called "certain significant aspects" of the trade relations between du Pont and General Motors are not only inaccurate, but also illustrate the extent to which the position of the Government requires a virtual retrial of the case. That the reference

which the contention is phrased, this is not an argument raising a question of law, but an argument directed to the correctness of the findings of fact. The Government cannot point to any specific legal errors in the standard applied by the court in making its findings on trade relations, nor does it attempt to identify any alternative legal standards which the court should have applied. Instead, to support its position the Government shifts to another argument on the facts—that the court's findings on trade relations are vitiated because the court's findings on the question of the alleged control of General Motors by du Pont are "patently erroneous" (p. 18). Since the attack on the latter findings, like the attack on the findings on trade relations, rests on the ground that the court did not accept the Government's evaluation of the evidence, both arguments ultimately call for a reappraisal of the evidentiary support for the numerous findings of the District Court.

1. In fact, however, there is no issue of substance presented even by the contention which is basic to the

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cited for each of these "aspects" is the opinion of the District Court, itself serves to demonstrate that they were considered by that court in making its findings. We have already dealt with the errors or misleading inferences in two of the statements in footnotes 3 and 4, pages 5, 7, *supra*, and although we cannot undertake a complete review of the evidence supporting the court's finding on trade relations, it is appropriate to refer the Court to the detailed findings relating to the change in managers at three General Motors car divisions in 1921 (referred to in the Jurisdictional Statement at pp. 13-14) at Opinion p. 20; to the unsuccessful efforts of Lammot du Pont to sell Flint products to Fisher Body (referred to at p. 14n.), at Opinion, pp. 77-79 and 103-106; and to the "super-discount" plan (referred to at pp. 14-15) at Opinion pp. 106-115.

Government's entire argument—that the District Court's findings on the control issue were "patently erroneous" (p. 20). In support of that contention the Government asserts (p. 18) that the findings of the District Court on the control issue were reached only "by ignoring factors which the Court has deemed significant." Even the summary review of the elaborate findings made by the District Court which is set out in the Statement, *supra*, serves to demonstrate the inaccuracy of that assertion. The "historical ties and associations" between du Pont and General Motors, and what the Government calls the "strategic" stockholdings of du Pont, which the Government suggests were ignored (p. 18), were both dealt with at length in the findings of the District Court, and were given full consideration along with all other relevant evidence in the record (Op. pp. 9-34, 40-46).

Nor is the Government accurate in suggesting (p. 19) that the District Court "ignored" the evidence on the matter of supplemental compensation in General Motors. The court made elaborate findings on this matter (pp. 34-40). The Government urged in the court below, and now urges in this Court, that it was "inevitable" that the contact of du Pont nominees on the General Motors Board with the General Motors bonus plans had the effect of bribing hundreds of General Motors officials, and perverting the honest business judgment of its executives. The District Court, after hearing many witnesses, including many of the officials of General Motors alleged to have been affected, and after becoming thoroughly acquainted with the several phases of General Motors' bonus plans over the past 30 years, did not find that the alleged

consequences were "inevitable" at all, and rejected the charges as wholly without substance.[7]

The Government's real complaint, in other words, is not that evidence which it tendered on the control issue was ignored, but that the District Court did not make the findings for which the Government contended. The Court is again asked to undertake a *de novo* review of the detailed findings of the District Court.

Nor is the Government more justified in the other branch of its criticism of the District Court's finding on control—that it relied on "factors which this Court has held are not determinative on that issue" (p. 18). The Jurisdictional Statement refers only to the finding by the District Court that du Pont had not conducted itself "as though it was the owner of a majority of the General Motors stock" (pp. 18-19).

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[7] The Jurisdictional Statement (p. 19) not only overstates the extent to which du Pont nominees on the General Motors Board of Directors were concerned with the matter of incentive compensation in General Motors but leaves the erroneous impression that the Managers Securities Plan, which du Pont nominees sponsored in 1923 in order to interest General Motors executives *in General Motors*, had continued to the date of the trial. In fact, that Plan terminated in 1929. Its successor plan, which was formulated and administered by General Motors' own executives, terminated in 1936. Since then incentive compensation at General Motors has been under the "regular" bonus plan administered by General Motors management; the recommendations of the management with respect to the amount of bonuses and the persons to whom they were paid were uniformly accepted by the Finance Committee and the Bonus and Salary Committee of the Board of Directors. See Opinion, pp. 34-40.

That such a finding is relevant can scarcely be denied.[8] The Government seeks to create the impression, however, that the court found that there could be no control in the absence of a 51 per cent stock ownership. This is exactly contrary to what the court did. The court did not consider the question of control in terms of majority control; it considered it in terms of "practical or working control." The court devoted 32 pages of the opinion (pp. 10-42) to a careful review of the history of every aspect of du Pont's stock interest and on the basis of that review found that du Pont does not have "practical or working control of General Motors" (p. 40).[9]

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[8] Its relevance is demonstrated by considering how extremely relevant the finding would have been had the Court reached the opposite conclusion—that du Pont *had* conducted itself as if it owned an absolute majority of General Motors stock.

[9] This Court has made it clear that "control" is a fact question, not a legal conclusion. In Rochester Telephone Corp. v. United States, 307 U. S. 125, the Court was called upon to review a finding of control made by the Federal Communications Commission. The Commission there, like the District Court here, had examined all "pertinent facts and aspects appearing in the record" and had concluded that "control" existed. This Court refused to reverse the Commission's finding, stating (307 U. S. at p. 145):

> "This is an issue of fact to be determined by the special circumstances of each case."

See also United States v. Marshall Transport Co., 322 U. S. 31, 38; National Labor Relations Board v. Hearst Publications, 322 U. S. 111, 130-131, in both of which the Court cited this principle of the Rochester case with approval.

The Government's reliance upon North American Co. v. Securities & Exchange Commission, 327 U. S. 686 (p. 18) is wide of the mark. In that case of the ten corporations alleged to be controlled, North American owned over 79 per cent of the voting stock in eight of them. The comments in the opinion which are

In sum, the District Court made careful findings on each aspect of the control issue which was tendered it by the Government's evidence or by the evidence offered by appellees (pp. 9-42). The Judge examined the amount and nature of du Pont's stockholdings (pp. 12, 18-19, 40-42); the extent and nature of the participation by du Pont nominees on the Board of General Motors (pp. 23-26), and on the major Board committees (pp. 26-39); the nature of the temporary participation by du Pont nominees in executive positions in the 1920's (pp. 19-23); the operation and effect of the bonus plans (pp. 34-40); the nature, importance, and independence of the management and the trends which were evident in the detailed history of the several decades which were explored before him (p. 40). True, the court did not find, on these matters, that the evidence supported the Government's charges, but it requires no more than a casual reading of the opinion to illustrate that the Government's criticism that the Court ignored relevant facts is without foundation.

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quoted in the Jurisdictional Statement (p. 18) were directed to a contention which has no relevance here—that North American did not control the companies notwithstanding its ownership of a majority of the voting stock, because there was no showing of direct intervention in the subsidiaries' affairs. As to the two companies in which the stock holding by North American was less than 50 per cent, the court points out (327 U. S. at 697, n. 5) that control had been found to exist after full hearings by the Commission, in proceedings which leave no doubt that the issue was regarded as one of fact, and in which all of the "special circumstances of each case" were fully canvassed. See Detroit Edison Co. v. Securities & Exchange Commission, 119 F. 2d 730 (6th Cir. 1941), certiorari denied, 314 U. S. 618; Pacific Gas & Electric Co. v. Securities & Exchange Commission, 127 F. 2d 378 (9th Cir., 1942), affirmed on rehearing by equally divided court, 139 F. 2d 298 (9th Cir. 1944), affirmed by equally divided court, 324 U. S. 826.

Moreover, and of major importance, the District Court tested the Government's charge of control in the very area in which it is urged that there had been a violation of the antitrust laws—in the commercial relationships between the two companies. The court made detailed findings on evidence which dealt with the sales or lack of sales of each du Pont product at each of the General Motors divisions which used such a product during the entire period since 1918 (pp. 66-196). Contemporaneous documents and statistical summaries were introduced by both sides; witnesses recounted their successful and unsuccessful efforts to sell du Pont products to General Motors divisions; and witnesses for General Motors explained the purchasing policies of that Company.

All of this the Government would sweep aside with the assertion (p. 20) that "the court evaluated that evidence on the assumption that the two companies at all times dealt with each other at arm's-length". Quite the contrary is true. Indeed, whether the basis upon which the two companies had dealt with each other *was* "arm's-length" was precisely the issue to which the evidence was directed. On the basis of all that evidence, oral and documentary, the District Court made detailed findings which were, to be sure, against the Government's contention, but which certainly did not rest on any "assumption". The Government now seeks to avoid these many specific findings against its contentions on the ground that they were made without taking into account "subtle pressures and influence" (p. 21). This can mean only that the Government believes either that the District Judge wholly missed the point of the issue which was sharply drawn before him at the trial, or that this Court, upon a re-examination of the entire record,

might reach a different conclusion. The opinion itself dispels the first belief; the obvious documentary and testimonial support for the findings makes the second belief irrelevant under Rule 52(a) of the Rules of Civil Procedure.

The patent weakness of an argument which would seek to have this Court retry complex issues of fact appears to have led the Government to suggest that control of General Motors is not a matter to be decided upon a complete review of all of the relevant evidence, but is an issue which can be determined by looking at only a few of the facts to the exclusion of most of the matters relating to control which were examined and weighed by the District Court. The Jurisdictional Statement refers (p. 17) to certain "admitted facts"—of which some are accurate, some are grossly overstated, and some are plainly wrong.[10]

[10] Treating the "admissions" stated by the Government on page 17 in order: (1) The percentage share of General Motors stock held by du Pont and the general distribution of the remaining shares is not in dispute. (2) Du Pont's joint control, with Durant, of General Motors from 1918 to 1920 was found by the court (Opinion, p. 17), although qualified, perhaps, by the additional finding that du Pont's role in the "partnership" with Durant was financial, not operational. (3) The court did not find, nor did the defendants admit, that du Pont controlled General Motors from 1920 to 1923; the court's finding and defendants' position on the situation during that period are set out at Opinion, p. 22. (4) The situation since 1923 (when P. S. du Pont resigned as president of General Motors, and Sloan, a General Motors man, became head of General Motors) with respect to the "important posts in the General Motors organization" held by "du Pont officials or persons clearly affiliated with it" and the "frequent and intimate consultation and correspondence between the two companies" is a completely distorted view of the full findings in this respect contained in the Opinion at pp. 22-34. (5) The awards under the

It then appears to assert that these so-called "admitted facts" establish that du Pont has stripped General Motors of its freedom to deal with du Pont's competitors (pp. 17-18).

This contention presents no substantial question for this Court. It is destroyed, first, by the fact that the so-called "admitted facts" are not admitted at all in many respects, and are more accurately little more than Government contentions which were qualified or rejected by the District Court. And second, there is no support whatever in any decision of the Court for the contention that that "control" is an issue to be decided by a process of choosing certain facts, and excluding others which are equally relevant. The "special circumstances of each case" upon which the decision on control must rest (*Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145), certainly means *all* of the circumstances, not merely a part of them.

2. Moreover, although the Jurisdictional Statement emphasizes the "control" issue, the attempt by the Government to create a substantial question on this issue suffers from a fatal defect of omission. It proceeds on the assumption that the Government will

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"stock purchase bonus plan"—apparently the Managers Securities Plan—were not made by a "committee on which du Pont had substantial, and sometimes majority" representation. The awards under the Managers Securities Plan were made by Sloan, Chief Executive Officer of General Motors, and approved without change by a committee consisting of two General Motors executives and one du Pont nominee, P. S. du Pont (Opinion, pp. 36-37). This plan terminated in 1929 (id., p. 38), was succeeded by a further stock purchase plan (Management Corporation) sponsored and administered by General Motors management, and since 1938 there have been no stock purchase bonus plans whatever (id. pp. 38-39). See footnote 9, p. 24, *supra*.

prevail if its contentions on that issue are upheld. In fact, du Pont's relationship to General Motors, no matter how characterized, is significant in this appeal only if it imposed a restriction on the freedom of General Motors to purchase where it desired, and to deal as it wished with its own chemical discoveries. The antitrust laws do not make it unlawful for one corporation to acquire control of another; such acts are significant under the statute only if a relationship is shown between the acquisition of control and a restraint or monopoly of the kind prohibited.

This Court so held in *United States* v. *Yellow Cab Co.*, 338 U. S. 338. There a manufacturer of taxicabs owned a majority of the stock of companies that operated cabs, and indisputably had "control." Over a period of years the manufacturing company sold the operating companies the major portion of the cabs they required in their business. The trial court held that there was no violation of the Sherman Act because the evidence did not show either that the stock relationships were part of a design to compel the purchase of cabs by the operating companies or that the purchases of cabs were made under compulsion, but rather showed that both the stock relationships and purchases rested on normal business reasons. *United States* v. *Yellow Cab Co.*, 80 F. Supp. 936 (N.D. Ill. 1948). This Court affirmed, recognizing that the basic issue was one of fact and that the Government raised no question of law that had an existence independent of it. (338 U. S. 338).[11]

[11] Two Justices dissented in the *Yellow Cab* case on the ground that the District Court had failed to "make specific findings as to whether the freedom of the taxicab companies to buy taxicabs from other manufacturers had been hobbled by the defendants' business arrangements, regardless of compulsion or intent to de-

The effect of du Pont's position on General Motors' commercial relationships—which is the ultimate issue—is a fact to be determined from all of the relevant evidence. The decisive character of that determination cannot be avoided by arguments that the trial court erred when it found that du Pont did not have "practical or working control" of General Motors. (p. 40). No matter how the issue of control is decided it does not dispose of the decisive issue which is how did General Motors' personnel react to du Pont's ownership of General Motors' stock and du Pont's participation on General Motors' Board and Committees.

The District Court did determine General Motors' reaction to du Pont's position, and in numerous different findings specifically found that General Motors was not at all influenced in its purchasing practices or in the exploitation of its chemical discoveries by its relationship to du Pont.[12] That the court had the relationship before it and closely considered it—and did not assume arm's-length dealing in evaluating the trade relations evidence, as the Government now asserts (p. 20)—is evident throughout the court's findings of fact. This was the issue which it recognized in connection with General Motors' supplemental compensation plans, in which it made the specific findings already quoted at p. 15, *supra*, and which it recognized in connection with General Motors' purchase of fab-

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stroy competition." In the instant case those specific findings are present; the District Court made findings that General Motors had complete freedom to purchase from anyone it wished, and to exploit its chemical discoveries as it saw fit. *E.g.*, Op., pp. 39, 170, 219.

[12] *E.g.*, Op. pp. 33, 39, 40, 89, 102, 115, 132, 134, 144, 170, 184, 196.

ries and its decision to employ du Pont to produce TEL, on which it made the specific findings quoted at pages 7 and 10, *supra*. Many more could be referred to; it will suffice to note here, by way of further examples, that in a finding directed to the Government's charge that du Pont used its position in General Motors to obtain business from Fisher Body, the opinion discussed the testimony of Lawrence Fisher, a Government witness, and found (p. 115):

> "* * * It is highly unlikely, if not impossible, that Fisher Body's purchasing practices could have been influenced by an agreement with du Pont or by the latter's position in General Motors without his knowledge. His forthright testimony and general demeanor on both direct and cross-examination are most convincing that Fisher Body was neither party to an agreement with du Pont nor the victim of du Pont domination."

And in a finding directed to General Motors' adoption of "Duco," the court found (pp. 132-133) that:

> "* * * Sloan recognized its potentialities in advance of some of his associates and urged the adoption of Duco. Such action on his part does not evidence a trade agreement with du Pont or response to alleged du Pont control. It is rather an instance of his foresight and leadership, not unlike a number of other incidents that contributed to his success as the Chief Executive Officer of General Motors."

These and the many other similar findings depend upon a mass of evidence. Much of that evidence is to be found in documents which, as the opinion shows, the trial court carefully weighed and considered, but much of the evidence is also to be found in the testimony of witnesses whose bearing and demeanor on the

stand and whose credibility the trial court was able to appraise at first hand. It is this evidence, in its entirety, which must be reviewed and appraised if the Government is to be given the trial *de novo* which, in effect, it now seeks in this Court. The scope and burden of that review and reappraisal cannot be avoided or mitigated by arguments that seek to create the impression that the only question in the case is whether du Pont "controlled" General Motors.

3. The Government's contention (pp. 22-23) that the District Court was in error in finding no violation of Section 7 of the Clayton Act likewise presents no substantial question for this Court.[13]

The Government urges no issue of law as to Section 7 but simply disagrees with the court's finding that there is no probability of restraint. The court weighed the Government's argument with the advantage, which must be rare in cases in which acquisitions of stock are challenged, of three decades of history to illuminate the question of the "probability" of a resultant restraint. It found that no restraint had occurred. The District Court stated (p. 220):

> "* * * The acquisition challenged by the Government—du Pont's investment in General Motors—took place over thirty years ago. In those many intervening years the record discloses that no restraint of trade has resulted. Accordingly, the Court is of the opinion that there is not, nor has there been, any basis for a finding that there is or has been any reasonable probability of such a restraint within the meaning of the Clayton Act."

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[13] The Government's contention relates to the provisions of Section 7 as they existed prior to the amendment made in 1950. By its terms that amendment was prospective only in its operation.

There can be no substantial doubt as to the correctness of the court's decision of this question of fact. The arguments to the contrary in the Jurisdictional Statement add nothing to the contentions made by the Government under the Sherman Act, but in fact embody the same errors which have already been discussed above.

4. The Government's final basis for review—the size of appellees—misconceives, we believe, the standards applicable in motions to affirm in this Court. The Court sits to resolve questions of law, not questions "of key importance in the industrial world." (Jur. Statement, p. 23). If the legal issues are insubstantial, as we believe they are here, no purpose is served by full briefs and argument, no matter who may be the parties to the appeal. When there has been a violation of the Sherman or Clayton Acts, it should be enjoined no matter what the size or dollar volume of sales of the companies who are guilty. When there has been no violation, as the District Court has found to be the case here, the size or dollar volume of sales of those found to be innocent must equally be irrelevant. Neither on certiorari nor on appeal does this Court exercise its review powers on cases simply because they involve large, rather than small, corporations.

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In summary, this Court is dealing here with a case in which, after a long and careful trial, the District Court found the Government's charges not proved. The comment of this Court in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, can equally well be applied here (pp. 340-341):

> "* * * The judgment below is supported by an opinion, prepared with obvious care, which ana-

lyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others."

Cf. *United States* v. *Oregon Medical Society*, 343 U. S. 326, 332; *United Shoe Machinery Corp.* v. *United States*, 347 U. S. 521.

The issues in the present case, and particularly those on which the Government charges that the District Court erred in its findings of fact, are of a character which gives particular force to the findings of the District Court. The Court is being asked to do exactly what it refused to do in the *Yellow Cab* case (338 U.S. at p. 340)—"to reweigh the evidence and review findings that are almost entirely concerned with imponderables, such as the intent of the parties to certain * * * business transactions." Why did General Motors decide sometimes to buy from du Pont and sometimes not? With what attitude did du Pont nominees serve on the General Motors Board and Board committees? Why did the du Pont nominees sponsor, in 1923, a stock purchase plan for General Motors executives? On all these issues, and many similar ones, the District Court had before it not only documents, but witnesses from both General Motors and du Pont who had been personal participants in the events in question. As this Court said in the *Yellow Cab* case (*id.* at p. 341):

"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."

See also *United States* v. *Oregon Medical Society*, 343 U. S. 326, 332, 339. Yet it is findings on matters such as these which the Government now seeks to challenge.

We believe that the judgment of the District Court should be affirmed.

Respectfully submitted,

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